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Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,
Respondents.
and
JENNIFER GRATZ and PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, JAMES J. DUDERSTADT, and THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA AND THE HONORABLE JOHN ELLIS "JEB" BUSH, GOVERNOR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHARLIE CRIST
Attorney General of Florida
CHRISTOPHER M. KISE
Solicitor General of Florida
LOUIS F. HUBENER
Deputy Solicitor General
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

DANIEL WOODRING
General Counsel
MICHAEL KOOI
Assistant General Counsel
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(850) 488-7707

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INTEREST OF THE *AMICI*

The State of Florida and Governor Jeb Bush, by and through Attorney General Charlie Crist, respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.4. The State of Florida ("Florida") has a population of approximately 16 million, and enrolls approximately 250,000 students in its State University System, with approximately 800,000 additional students enrolled in its Community College System. Because of its ethnically and racially diverse population, Florida has an interest in promoting diversity in higher education, as well as in all other state programs, including state contracting and employment. Indeed, Florida has adopted numerous policies to promote diversity through empowerment and equal opportunity for all.

The key question before this Court is whether the University of Michigan and the University of Michigan Law School's use of racial preferences in admissions violates the Equal Protection Clause of the Fourteenth Amendment. Florida schools in times past utilized comparable racial preferences, but in November 1999, Governor Bush established the One Florida Initiative. *The One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida,* June, 2002 <http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc>. One Florida removed racial or ethnic preferences, set-asides, and quotas as acceptable practices for granting admission to the undergraduate programs of the state universities effective for Fall 2000, and to the graduate and professional programs effective for Fall 2001. *Id.* at 11; *see* Rule 6C-6.002(7), Florida Administrative Code (2002). This race-neutral admissions policy in Florida's State University System anticipated, and is in accord with, the Eleventh Circuit's ruling in *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234 (11th Cir. 2001),

which invalidated a university's racially preferential admissions policy.

Florida therefore has an interest in this Court's consideration of whether admissions decisions must be made on a race-neutral basis, as this Court requires in state contracting and employment cases in the absence of present evidence of the effects of past discrimination. Florida can share with the Court that through the use of race-neutral means, it has maintained a State University System that reflects the rich diversity of Florida's population.

The best basis for diversity in higher education is not racial preferences and commensurately lower standards. Instead, Florida's approach uses two different methods. First, Florida has taken steps to develop a talented and diverse pool of university applicants by providing opportunities for a rigorous education for all students who so choose. Second, Florida has provided alternative but race-neutral means of admission to those students who are striving for excellence, but who may have been disadvantaged by a lack of educational opportunities.

Florida urges this Court to reverse the lower court decisions and clarify that university admissions decisions, like state decisions in the contracting and employment contexts, must be made on a race-neutral basis absent evidence of present effects of past discrimination. The results of the One Florida Initiative demonstrate that the goal of diversity can be attained without resorting to racially preferential policies.

SUMMARY OF ARGUMENT

Florida is committed to the paramount value of maintaining diverse institutions of higher learning. The issue, of course, is how best to attain that diversity. Our Constitution demands that the government treat each individual with equal dignity and respect, regardless of his or her race or ethnicity. To give effect to this principle, this Court has previously held that government may classify its citizens on the basis of race only when absolutely necessary to remedy the present effects of past discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 511 (1989); *U.S. v. Paradise*, 480 U.S. 149, 170-171 (1987). We urge the Court to apply this rigorous standard in the context of higher education and thereby invalidate the race-based admissions policies at issue in this case.

Florida's experience under Governor Jeb Bush's One Florida Initiative demonstrates that diversity can be attained through race-neutral means. Respect for the principle of non-discrimination need not come at the expense of maintaining racially and ethnically diverse institutions of higher learning. In the time since Florida adopted rules prohibiting its universities and graduate schools from considering race in admissions decisions, the overall minority composition of those institutions has remained steady and perhaps even increased. Florida has accomplished this result through policies that develop students' abilities to meet the challenges of higher education and that offer focused assistance to students, regardless of race, who are underprivileged.

Florida's ability to achieve diversity through race-neutral means strongly suggests that the race-conscious admissions policies at issue here are not narrowly-tailored to meet their purported ends. But this Court has long required that government-sanctioned racial classifications be narrowly tailored to achieve a compelling government interest. This failure to

meet the Court's narrow-tailoring requirement should be fatal to the constitutionality of the programs at issue in this case.

In any event, although they are purportedly designed to further the goal of viewpoint diversity, the policies at issue appear to seek racial and ethnic diversity for its own sake. This inference seems inescapable, given that the policies assign preferences based solely on race or ethnicity, regardless of the applicant's particular views or life experiences. This Court has already rejected similar claims that the pursuit of racial and ethnic diversity--in and of itself--constitutes a compelling government interest. Diversity thus defined is no more compelling an interest in the context of higher education.

ARGUMENT

The pertinent question before this Court in both *Grutter v. Bollinger,* 288 F. 3d 732, (6th Cir. 2002), *cert. granted,* 123 S.Ct. 617 (2002) and *Gratz v. Bollinger,* 122 F.Supp.2d 811, (E.D. Mich. 2000), *cert. granted,* 123 S.Ct. 602 (2002), is whether the University of Michigan's use of racial preferences in university and law school admissions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As Petitioners' briefs comprehensively address the constitutionality of the specific Michigan programs, this brief will focus on Florida's experience in implementing race-neutral admissions programs while increasing educational opportunities for its diverse population. Florida will argue that racially preferential admissions programs are not required to develop a diverse State University System, and that such programs are no more constitutional than similar decisions in the context of state contracting or employment.

I. FLORIDA'S EXPERIENCE DEMONSTRATES THAT DIVERSITY IN A STATE UNIVERSITY SYSTEM IS ATTAINABLE BY RACE-NEUTRAL MEANS.

The primary goal from Florida's perspective is that all of Florida's students be provided the necessary educational tools and have truly equal educational opportunities available to them. This empowerment and equal opportunity will then result in a diverse State University System. This is a continuing challenge, as Florida is an increasingly diverse and growing state. From 1990 to 2000, the state's population increased from approximately 13 million to 16 million people.[1] In the past ten

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[1] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>; *U.S. Census Bureau, 1990 General Population and Housing Characteristics*, (last

years, Florida's Hispanic-American population has nearly doubled, from an estimated 1.5 million to 2.8 million. *Id.* Florida is now home to one out of every thirteen Hispanic-Americans in the country.[2] Over the same ten-year period, Florida's African-American population grew steadily from 1.8 million to 2.4 million. [3]

With such rich diversity, Florida's state universities will benefit from the ability to tap a talented and diverse pool of students who have been provided with the educational tools needed to meet the challenges of higher education. The goal is to validate every student's ability to strive for and participate in higher education. This policy will result in a diverse student body that reflects equal student opportunity.

A. Florida's State University System Has Adopted Race-Neutral Admissions Policies And Continues To Be Racially And Ethnically Diverse.

Governor Bush proposed his One Florida Initiative in November, 1999 and requested that the rules governing

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visited January 13, 2003), <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_STF1_DP1&_geo_id=04000US12>

[2] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <http://www.census.gov/acs/www/Products/Profiles/Chg/2001/SS01/Tabular/010/01000US1.htm>; *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>.

[3] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>; *U.S. Census Bureau, 1990 General Population and Housing Characteristics*, (last visited January 13, 2003), <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_STF1_DP1&_geo_id=04000US12>.

admissions into the State University System be modified to prohibit preferential admissions on the basis of race or gender. The State Board of Education approved these modifications on February 22, 2000. The undergraduate rule was effective for Fall 2000 admissions, and the graduate and professional rule was effective for Fall 2001 admissions. *See* Rule 6C-6.002(7), Florida Administrative Code (2002). Prior to these rule changes, various universities and programs within the university system had used racial preferences. *See NAACP v. Florida Board of Regents,* Final Order, July 12, 2000, <http://www.doah.state.fl.us/internet/search/detail.cfm?CaseNo=00-000952&URLString=0 >, at ¶ 105, *rev'd*, 822 So. 2d 1 (Fla. 1st DCA 2002), *appeal docketed*, No. 02-1878 (Fla. Sup.Ct. Aug. 22, 2002).

Since the implementation of the One Florida policy of race-neutral admissions in higher education, Florida's State University System has maintained ethnic and racial diversity within its overall student body. *The One Florida Accountability Commission,* at Chart 3, <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment2.ppt> (June 17, 2002). In the last year prior to the effective date of Florida's new policy of race-neutrality (1999-2000), the percentage of minority first-time-in-college students enrolled in Florida's undergraduate institutions was 36.6%. Two years later that percentage is 36.68%. *Id.* Thus, although some individual universities showed increases in minority enrollment while others showed a decrease, the overall representation of minorities within the State University System has remained stable.

Florida State University and the University of Florida are the State University System's flagship universities. Following its implementation of a race-neutral admissions policy, Florida State University's minority enrollment increased. Florida State's African-American student enrollment rose from 11.01% in 1999-2000 to 11.85% in 2001-2002, a gain of almost an entire percentage point. *One Florida Accountability Commission*, at Chart 7, <http://www.myflorida.com/myflorida/government/

otherinfo/documents/enrollment3.xls>. Florida State University's Hispanic-American student enrollment increased from 8.74% to 12.85% during the same period. *Id.* Minority representation did decline slightly at the University of Florida, from 9.95% in 1999-2000 to 7.15% in 2001-2002 for African-American students, and from 11.38% to 11.13% for Hispanic-American students. *Id.* However, even with this decline, the university has maintained a significant minority representation.[4]

Diversity in graduate and professional school enrollment has remained steady as well. In fact, the state's graduate, medical, and business schools are enrolling approximately the same or a greater number of minority students as in the past. *One Florida Accountability Commission*, at Chart 4, <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment3.ppt> (June 17, 2002). In the first year of the implementation of Florida's race-neutral admissions policy, system-wide minority enrollment in graduate programs increased from 21.6 % in 2000-2001 to 24.95% in 2001-2002. *Id.* Only law school admissions experienced a slight decline of .03 % (from 24.63% in 2000-2001 to 24.60% in 2001-2002). *Id.* However, the state has just authorized two new law schools at Florida International University (FIU) and Florida Agricultural and Mechanical University. These schools will increase opportunities for minorities to attend. By way of example, the inaugural class at the FIU law school was 44% Hispanic-American and 8% African-American. *FIU Press Release*, August 16, 2002, <Http://news.fiu.edu/releases/2002/08_16_law_convocation.htm>.

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[4]Preliminary admissions data shows that the African-American enrollment at the University of Florida in 2002-2003 is up 43.26% from the previous year while Hispanic-American enrollment has risen by 13.13%. System-wide minority enrollment will remain steady at approximately 36%. *See Governor's Press Release*, September 6, 2002, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02.html>.

B. Florida's Goal Of Providing All Students Equal Opportunity For Educational Achievement Is Accomplished By Better Equipping All Students For Higher Education.

The best way to have a qualified and diverse pool of students available for admission to institutions of higher education is to provide them the opportunity to acquire the necessary tools prior to seeking admission. Concerned that many Florida students were not acquiring the basic educational tools for higher education and life in general, Governor Jeb Bush and the Florida Legislature, in the summer of 1999, implemented the A+ Education Plan. *Governor's Press Release*, November 2, 1999, <http://sun6.dms.state.fl.us/eog_new/eog/library/releases/1999/November/leg_committee_a+_11-2-99.html>. While this plan has a number of components, the operational premise of the program is that every student can learn, and that an accountability system must be implemented that identifies those students who are making progress, as well as identifying those students, classes, and schools that are not making progress. Schools are assigned grades based on student achievement. In this way, teachers, administrators, and districts can be held accountable for student achievement, and resources and efforts can be focused on the most needy students. Then, in addition to targeting more resources to the failing schools, students in schools that are failing for two years have the opportunity of transferring to a better public school or a private school. *See* Section 1002.38, Florida Statutes (2002). The plan focuses on improving achievement of all students, but particularly those students among the bottom 25% in every school in the state. *One Florida Accountability Commission* at 11.

The results of this new program of accountability, responsibility, and remediation will not be fully felt until a generation of students has passed through the system. Nonetheless, in comparing student data from 1998 to 2002, it is

evident that already there has been significant improvement. *Governor's Press Release*, Sept. 6, 2002, <http://sun6.dms.state.fl.us/eog_new/eog/library/releases/2002/September/fcat-9-6-02.html>. This is particularly true among students in the lower grades, and especially true among young minority students. *Id.* There is evidence that the student achievement gap between minority and non-minority students is closing in Florida. Over the last four years learning gains were made by all groups, but African-American and Hispanic-American students made the most progress in student achievement. *Id.* Evidence of this progress is the fact that the number of students scoring in the lowest level on the reading subsection of the Florida Comprehensive Assessment Test (FCAT) is declining. *Id.*

The Florida Comprehensive Assessment Test is scaled from 1-5. The percentage of non-Hispanic whites scoring at the lowest level declined from 18% to 13%, the percentage of Hispanic-Americans declined from 42% to 27%, and the percentage of African-Americans declined dramatically from 58% to 38%. *Id.* The percentage of students scoring at least a level 3 on the FCAT, the level equivalent to reading at grade level, is increasing. The percentage of non-Hispanic whites scoring at level 3 or better increased from 65% to 74%, the percentage of Hispanic-Americans increased from 38% to 56%, and the percentage of African-Americans increased from 23% to 42%. *Id.* While these improvements have been dramatic, Florida recognizes it still has a long way to travel on the road to educational improvement.

In addition to the A+ program, Florida also expanded its College Reach Out Program ("CROP"). *See* Section 1007.34, Florida Statutes (2002). This program identifies disadvantaged students, of whatever race, and strives to prepare them for college through an increased number of tutors, homework clubs, and after-school and in-school academic enhancement strategies. CROP projects emphasize the importance of continuous interaction and offer a wide variety of activities and

opportunities for participants. *One Florida Accountability Commission*, at 15.

CROP presently serves approximately 8,446 students through eleven state universities, twenty-six community colleges, and seven independent colleges and universities. *Id.* Approximately 75% (6,325) of these students are African-American and 9% (745) are Hispanic-American. *Id.* Initial studies have shown that the CROP program is successfully improving the educational preparation and motivation of poor and educationally disadvantaged students. For example, in the 1998-1999 school year, 87% of the high school seniors served by CROP received a standard diploma, compared to 71% of the random sample stratified on the basis of race and income. *Id.* Of the CROP students who graduated, 72% went on to pursue a postsecondary education, compared to only 44% of the random sample. *Id.* at 16.

Some disadvantaged students have never even considered that college might be an option for them. These students may be less likely to take the SAT or ACT as a prerequisite for college admissions. However, students who take examinations such as the Preliminary SAT/National Merit Scholarship Qualifying Test, are more likely to take the SAT or ACT and continue on to college, but the cost of taking these preliminary examinations may have been a bar to some. Florida therefore made the Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT/NMSQT) and the PLAN, which is a tenth grade pre-college test offered by ACT, Inc., available at no cost to all students, and has publicized this opportunity. *Id. at 17.*

Providing this test free of charge obviously removes the previous cost barriers that hindered economically disadvantaged students. Before the One Florida Initiative, the test was administered only to those who were already aspiring to go to college and could afford the test fee. Now it is available to all students. *Id.* These efforts have resulted in a two-year increase of 176% in the number of African-Americans and an increase of

256% in the number of Hispanic-Americans taking the PSAT. *Id.* at 18. It also has resulted in a one-year increase of 221% in the number of African-Americans and an increase of 243% in the number of Hispanic-Americans taking the PLAN test. *Id.*

In 2000, Florida entered into a partnership with the College Board as part of a comprehensive program to expand advanced placement courses and encourage students to enroll in them. *Id.* at 21. The program also was designed to help prepare students for success in college preparatory courses and for college admissions through mentoring, tutoring and test preparation activities. *Id.* The partnership also included the Florida Education Fund's thirteen Centers of Excellence, which are community-based centers whose mission is to identify and motivate historically under-represented and disadvantaged elementary and secondary students to pursue higher education. *Id.* at 22. With the help of these centers, the College Board is able to offer community-based SAT preparation courses for college-bound students across the state. *Id.* These classes are held in various schools and churches in disadvantaged areas, and the state has intensified its efforts to inform the public of these opportunities. *Id.*

In order to accommodate the anticipated increases in achievement and the interest in college preparatory courses, Florida has expanded its International Baccalaureate[5] and Advanced Placement courses for 11th and 12th grade students. *Id.* at 24. These courses provide an excellent opportunity to gain an advantage in college admissions and to enhance retention once there. One Florida has challenged schools to get the message out and encourage more participation in Advanced Placement courses, especially among traditionally under-represented

[5]The International Baccalaureate Program is a demanding two-year international pre-university course of study leading to rigorous examinations, successful completion of which results in the awarding of the International Baccalaureate Diploma. *See* § 1007.27(8), Fla. Stat.

students, such as minorities. *Id.* Teachers in disadvantaged areas are receiving technical assistance and training in an effort to increase the number of teachers available and certified to teach Advanced Placement courses.[6] *Id.* at 25.

As a result of these efforts, participation in these courses has greatly increased, as has the number of students who pass the Advanced Placement tests and exams. *Id.* Minority participation in these courses and the minority passage rate have outpaced the increases of non-minorities over the last two years.[7] *Id.* at 25-27. The quality of examination and test scores continues to improve as well, while more and more minority students are earning scores that qualify for college credit. *Id.*

Additionally, the Florida Virtual School provides an online curriculum of advanced placement courses to students who may not have access to such courses at their schools. *Id.* at 19. Most of these students attend rural or inner-city schools that have yet to expand their advanced placement course opportunities. *Id.* at 20. Minority enrollment in Florida Virtual School classes has climbed from just over 200 in 1999-2000 to over 1200 in 2001-2002 and continues to grow. *Id.*

One Florida has also called on every public and private community college and four-year institution to form

[6]Florida Advanced Placement teachers also receive a fifty dollar per student bonus up to a maximum of $2,000 for each student taught by that teacher who scores at a proficient level on the College Board Advanced Placement Examination. An additional $500 bonus may be earned by teachers at low-performing schools that have at least one student that scores at a proficient level on the test. *See* Section 1011.62, Florida Statutes (2002).

[7]In the past year, the number of African-American students taking Advanced Placement tests in Florida rose by 21%, and the number of Hispanic-Americans taking the tests rose 22%. *See* Tampa Tribune, *Bush: Data shows Increase in Black Students Taking Advance Placement Tests,* Oct. 23, 2002, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/test.html>

Postsecondary Opportunity Alliances. *Id.* at 27. These partnerships with low performing elementary, middle, and high schools in high poverty areas involve tutoring of students, teacher training, and incentives to push for higher achievement and aspiration. *Id.* The efforts of the students and faculty of the colleges and universities that have participated in these alliances have produced noticeable improvements in the standardized test scores and grades received by the schools being assisted. Additionally, the colleges and universities are able to target and work with potential postsecondary students at an earlier age. *Id.* at 28-29.

One Florida has also placed a greater emphasis on funding for mentoring programs that currently exist throughout the state. *Id.* at 30. In 2001, the state partnered with over 300 organizations to provide regular tutoring and mentoring to K-12 students by 72,579 mentors. *Id.* Another 42,981 mentors provided services through other community-based organizations. *Id.*

All of these programs are premised on the idea that the best way to ensure minority participation in all areas of higher education is to provide the same opportunities and support to all students and to hold minority students to the same standards as all other students. As noted, while Florida is making significant progress in these areas, we have not yet arrived, particularly with regard to students already in the upper grades. In recognition of this fact, Florida determined that certain students who had been educationally disadvantaged, but who were still striving to do their best, should, without regard to their race or ethnic origin, be extended assistance in gaining admission to the State University System. Again, Florida extended this assistance on a race-neutral basis.

C. The Goal Of Providing All Students Equal Opportunity For Educational Achievement Is Accomplished By Recognizing That Some Students, Without Regard to Racial or Ethnic Background, Have Been Disadvantaged In Educational Opportunities.

The achievement gap that developed between the scores of non-Hispanic white and minority students from the decades of the 'soft bigotry of low expectations' demonstrates that there is still a need to extend a helping hand to students, many of whom are minority students, who may not have enjoyed the same opportunities for educational excellence. With that in mind, a significant part of Florida's effort to maintain equal educational opportunity, especially for those students further along in the educational system and currently at a disadvantage, was the Talented Twenty Program. Through this program, Florida became the only state in America to guarantee state university admission to all of its public high school students who graduate in the top 20% of their class. *Id.* at 5. Students must have completed the required 19 credits of course work and have an SAT or ACT score. Rule 6C-6.002(5), Florida Administrative Code (2002). There is no minimum test score required. *Id.*

The Talented Twenty Program was designed to improve postsecondary opportunities for minorities and all students by guaranteeing admission to the top students at every school, whether they graduated from a high school that had the best or the worst academic standards in the state. In this way, top students from the poorest district have the same opportunity of admission as top students from the most elite school. It is unlikely that students graduating in the top 20 percent of their class from the state's best schools need the guaranteed admission of the Talented Twenty Program, as they would be otherwise admitted. The program therefore was intended to benefit students at poorer schools who may have striven to do their best,

but who still needed assistance gaining admission to the state university system. [8]

In conjunction with the Talented Twenty Program, the University of Florida has instituted a "Talented 5%" program, guaranteeing admission into the University of Florida for the top quarter of the Talented Twenty Program. *Id.* at 34. Because the University of Florida has just instituted this program, it is too early to analyze fully its impact.

Florida also has developed a unique "2+2" system which assures that a student who successfully completes an associate degree program at a community college is guaranteed admission into a state university as if he or she had initially attended a state university. *See* Section 1607.23, Florida Statutes; *see also* Rule 6A-10.024 Florida Administrative Code (2002). This is accomplished through a system-wide articulation agreement and a common course numbering system granting the transfer of credit obtained in a community college to a university. The Community College System has an open admission policy for students meeting basic admission criteria. Thus, even students from the most disadvantaged backgrounds may ultimately gain university admissions. The 2+2 system further provides the opportunity for all students to obtain a four-year degree, even if they were not initially admitted into a state university.

II. FLORIDA'S EXPERIENCE DEMONSTRATES THAT A RACIALLY PREFERENTIAL ADMISSIONS PROCESS CANNOT PASS CONSTITUTIONAL MUSTER.

The admissions policies at the University of Michigan's Law School and the College of Literature, Science and the Arts

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[8]Florida additionally increased need-based financial aid for the year 2000-2001 by 43.5% and has continued to increase such aid since that time. *One Florida Accountability Commission* at 36.

have been set forth in greater detail by the parties to this case, and Florida sees no need to further detail such policies. For purposes of this argument, it is enough to say that the admissions policies in both schools, like the admissions policies formerly in place at Florida universities, use race as a factor that can improve certain minority applicants' chances of being granted admission. Some emphasis has been placed by the lower courts upon racial preference being only one of many factors considered in granting admission. The Sixth Circuit suggested that by using race as one of many factors, Respondents' policies were "virtually indistinguishable" from the "Harvard plan" noted in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and were, therefore, constitutionally permissible. *Grutter*, 288 F.3d at 747.

While there is much before this Court in the way of argument as to the holding and significance of Justice Powell's opinion in *Bakke*, a program's similarity to the "Harvard plan" should not be a guarantee of its constitutionality. An admissions decision is a binary, yes/no decision, and as such, any racial preference could be sufficient to trip the admittance switch.

Respondents' admissions policies gave preferences on the basis of race or ethnicity, and appear to have simply assumed that those categories necessarily corresponded to particular viewpoints. Respondents' assumption that efforts to provide racial diversity equate to viewpoint or academic diversity is problematic. As this Court noted in *Miller v. Johnson*, 515 U.S. 900, 920 (1995), when a state actor makes an assumption that members of a particular race think alike or share the same political views it engages in "racial stereotyping at odds with equal protection mandates." *See also Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

Understanding, therefore, that the matter before the Court is one of classification based on immutable racial characteristics, the Court's analysis is the same under both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil

Rights Act of 1964, 42 U.S.C. § 2000d. *Adarand*, 515 U.S. at 234, (*citing Fullilove v. Klutznick*, 448 U.S. 523 and n. 1 (1980)); *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992). The underlying purpose of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). This Court has clarified that courts must apply the strict scrutiny standard when evaluating all racial classifications, including those that may be considered benign. *Adarand*, 515 U.S. at 226; *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

Under the Court's strict scrutiny analysis there are two questions that must be answered in the affirmative in order for any challenged racial classification to be constitutional: 1) does it serve a compelling state interest? and 2) is it narrowly tailored to the achievement of that interest? *Adarand*, 515 U.S. at 227. The party implementing the classification bears the burden of proving that the racial classification is narrowly tailored to serve a compelling interest. *Croson*, 488 U.S. at 510-511. As Florida's race-neutral policies and diverse results demonstrate, the admissions policies at issue in this case do not withstand the burden of strict scrutiny.

A. A System Of Racially Preferential Admissions Is Not Narrowly Tailored To Accomplish Diversity, And Is Therefore Unconstitutional.

Florida believes in diversity. However, the fact that Florida has developed a race-neutral way to accomplish the goals which the Respondents are pursuing speaks directly to the question of whether the Respondents' policies are narrowly tailored.

Even assuming that the diversity that the University of Michigan is attempting to achieve constitutes a compelling state interest, its race-conscious admissions policies are not narrowly

tailored to accomplish that interest. The Sixth Circuit "found" that "the Law School ha[d] adequately considered race-neutral alternatives." *Grutter*, 228 F.3d at 750. However, the results of Florida's policies call into question this finding and provide evidence that diverse institutions of higher education can be attained through race-neutral means. If a compelling interest may be served without resort to racial classification, a race-based program is by definition not narrowly tailored. *Johnson*, 263 F.3d at 1259. Indeed, this Court has established that the efficacy of alternative remedies, including race-neutral policies, is a factor to be considered in determining whether a state racial classification is narrowly tailored. *Paradise*, 480 U.S. at 171. *See also Johnson*, 263 F.3d at 1252; *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994). The current diversity of the State University System under race-neutral admissions standards demonstrates that the programs outlined by Florida, such as the A+ Education Plan, the Talented Twenty Plan, the University of Florida's 5% Plan, and the 2+2 Plan, are methods that may be used to arrive at a racially diverse higher education system.

Florida's programs, and the principles that they advance, are more than just "another" way of accomplishing true diversity. They provide a better way. Florida's plan is better in that it no longer accepts the lack of quality in the public schools that serve our underprivileged children; better because it recognizes the need to provide mentoring, tutoring, and other extra attention to those underprivileged children and their teachers; better because it encourages all students regardless of race or economic status to aspire to post-secondary education; better because it no longer accepts a separate standard on the basis of race; better because it focuses on providing all races with the opportunity to meet common standards; and finally, better because it looks forward to a day when racial classifications and separate standards are no longer deemed necessary by anyone.

The ultimate goal of the Equal Protection Clause of the Fourteenth Amendment was to put an end to racially motivated state action. *Hopwood v. State of Texas*, 78 F.3d 932, 947-94[illegible] (5th Cir. 1998). Florida's plan effectively accomplishes this goal by ending racial classifications, but in a way that continues to provide diversity in higher education and equal educational opportunities that will close the achievement gap.

B. The Justification For Diversity Based Solely Upon A Public Policy Argument, Without A Showing That It Is Necessary To Correct Past Discrimination, Is Insufficient To Meet The Compelling Interest Requirements.

This Court has held in contexts other than higher education that in order to meet the compelling interest standard, any classification based on race requires some showing of prior discrimination by the governmental unit before limited use of racial classification is allowed as a basis for decision making. *Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 500. In the educational context, *Bakke* cannot be said to clearly hold to the contrary, nor should the equal protection clause be satisfied by anything less.

Justice Stevens, in his dissent in *Wygant*, argued that it is not necessary to find the existence of past discrimination to support race-based action with regard to employment decisions affecting teachers. He suggested that the Court should simply consider whether the questioned action advances the "public interest," and whether the manner in which it is pursued justifies any adverse effects on the disadvantaged groups. *Wygant*, 476 U.S. at 313. That argument was rejected by the Court. This Court specifically indicated that such a theory has no logical stopping point, and would allow discriminatory practices long past the point required by any legitimate remedial purpose. *Id.* at 275.

There is no valid reason to justify this Court's use of a different test for determining whether diversity is a compelling interest within the student body of a university as opposed to other areas. Racial diversity is no more compelling a goal in the higher education context than in the context of other institutions or areas of state decision making, including those upon which this Court has already ruled (i.e., government contracting and faculty layoffs). *Adarand*, 515 U.S. 200, 226 (1995); *Croson*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

CONCLUSION

Amici respectfully request that this Court reverse the decisions of the lower courts.

Respectfully submitted,

CHARLIE CRIST
Attorney General of Florida

CHRISTOPHER M. KISE
Solicitor General of Florida

LOUIS F. HUBENER
Deputy Solicitor General
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

DANIEL WOODRING
General Counsel

MICHAEL KOOI
Assistant General Counsel
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(850) 488-7707